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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. PATRICK RAMONT WARE, JR., Defendant and Appellant.	F069845 (Stanislaus Super. Ct. No. 1448262) **OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Nancy Ashley, Judge.

Candace Hale, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Amanda D. Cary and Louis M. Vasquez, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant/defendant Patrick Ramont Ware, Jr., was charged and convicted of two counts of robbery while acting in concert, with special allegations for personal use of a

firearm, and prior strike and serious felony convictions. He was sentenced to 34 years four months in state prison.

On appeal, defendant contends the court improperly instructed the jury with CALCRIM No. 315, on the consideration of eyewitness identification testimony, and his defense counsel was prejudicially ineffective for failing to object to the instruction. He also contends counsel was ineffective during closing argument. Finally, the parties agree the court improperly sentenced defendant for a prior serious felony enhancement.

We order the correction of the abstract of judgment and otherwise affirm.

FACTS

DaeJauni Riddley (Riddley) and her boyfriend, Devon Bradford (Bradford), lived in an apartment on West Granger Avenue in Modesto.

Just before midnight on August 9, 2012, Riddley was in the bedroom and Bradford was in the kitchen. Riddley suddenly heard a "big thud" in her living room, as the apartment's front door was "busted wide open" and the door frame was broken.

Riddley testified that Bradford ran into the bedroom, jumped out of a partially-opened window, and escaped. Bradford broke the glass as he jumped out.

Riddley stayed in the bedroom. She was frightened and grabbed an ornamental sword that was in the bedroom. She stood up and held the sword against her body, and hoped it would scare the intruders.

The robbery

Riddley testified that four or five suspects entered her bedroom. Riddley testified that one man was "very heavyset," stood in front of the other suspects, and did all the talking.[1]

[1] For ease of reference, we will refer to the "heavyset man" as the "primary suspect" at this point. As we will explain below, Riddley later identified defendant as this person.

Riddley testified the primary suspect asked, " 'Where did he go?' " Riddley believed he was asking about Bradford. Riddley cursed him, said she did not know, and told the men to get out of her apartment. The primary suspect asked, " 'Where is the money at, bitch?' " Riddley said she did not know, again cursed them, and told them to get out.

The primary suspect kept asking, " 'Where's the f**kin' money at?' " Riddley testified that because she was not cooperating, the primary suspect "bashed" the side of her face with a black metal pistol. The pistol had a cylinder and she could see bullets inside that cylinder.[2] Riddley suffered an injury to her face, but she kept her balance and stayed on her feet. She again told the men to get out.

Riddley testified that there were three cellphones on a nearby desk. She glanced at them, and thought about grabbing one to call for help. However, the primary suspect took the three cellphones and put them in his pocket before she could reach for one.

Riddley testified the primary suspect grabbed her wrist, swung her around, and tried to throw her on the bed. Riddley dropped the sword but prevented herself from falling, and instead sat on the bed. Riddley tried to kick the primary suspect. He told her not to do so.

Riddley testified the men finally left the apartment, running out the front door. The primary suspect was the last person to leave.

After all the suspects left, Bradford returned to the apartment. He had injuries on his arm and foot from jumping out of the window and breaking the glass. Riddley determined that the primary suspect took the three cellphones, and that someone took three rings which belonged to Bradford.

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[2] Riddley initially told the police that the primary suspect hit her with a semiautomatic gun. An investigator later showed her a semiautomatic weapon, and Riddley clarified that the suspect had a gun with a cylinder that contained bullets.

The neighbor's testimony

Angela Dizney lived in the same apartment complex as Riddley. She was in bed when she heard the sound of broken glass and looked outside. Dizney could see into Riddley's living room because Riddley's window shades were open and interior lights were on. She did not see anyone inside Riddley's apartment, but instead saw "shadows moving around" against the interior walls. Dizney heard screams and a female voice repeatedly yelling to " '[g]et out.' " After a few minutes, Dizney saw three people run out of Riddley's front door. They were wearing black hooded sweatshirts, and the hoods were over their heads. They ran to a nearby parked car and drove away from the area. Dizney called 911.

Riddley's trial description of the suspects

At trial, Riddley testified the lights were on in the bedroom, and she had no difficulty seeing the suspects during the robbery.

Riddley testified the primary suspect who did all the talking was "a dark male, chunky, very heavyset, with dreads…. It was long dreads, approximately down to his shoulders in a ponytail." He was between five feet eight inches to six feet tall. This man was wearing dark jeans and a black hooded sweatshirt. The sweatshirt did not have a zipper, and the hood was not over the man's head. She did not get a good look at his shoes. He was not wearing gloves.

Riddley testified the primary suspect stood within two feet of her when he demanded the money. Riddley directly faced him, and she got a good look at the front of his face, hair, and clothing.

Riddley testified that she kept looking at the primary suspect's face after he hit her with the gun and tried to throw her on the bed. He was three to four feet from her at the time. Riddley focused on his face and hair, and had no trouble getting a good view of him.

There were four other men standing behind the primary suspect. Riddley testified "most of them were dark skinned, and one that came up to me was light skinned." They were all wearing dark clothing and hooded sweatshirts, but the hoods were not over their heads. Riddley testified that the other four men also had guns.

The 911 call

Riddley called 911 and reported that four or five black men broke down the door and came into the apartment. Riddley told the operator that Bradford climbed out of the window to get help, and she stayed behind. Riddley said all the men had guns. They were looking for money, and she told them there wasn't any money there. Riddley told the operator that the men took three diamond rings that belonged to Bradford. Riddley said she was hit in the face with a gun.

Riddley told the operator that they did not know who the men were. Riddley said all the men were in their 20's. She had "seen one of their faces and there were – one of them was heavy weight, he was dark, was a dark male, he had dreads. They were all in black, black hoodies. I think I seen another one, he was light skinned, a little skinny." She said one man's face was entirely covered.

The initial investigation

At 1:07 a.m., Modesto Police Officer Payne responded to Riddley's apartment. The front door was kicked in, and the bedroom window was broken. Riddley was bleeding from the left side of her eye, and there was small knot under the open wound.

Riddley told Officer Payne that she was in the bedroom with Bradford when they heard a bang. Riddley also said she was in the hallway and forced back into the bedroom at some point during the robbery. Riddley described the suspect who hit her with the gun, and said she looked at him right in the face. She said the suspects took rings and three cellphones.

Based on Riddley's description, Officer Payne broadcast an alert for the man who hit her as a "heavyset black male adult, five-eight, with dreads, black hoodie, black

pants …." Payne asked Riddley whether she saw this man's shoes. Riddley said she did not see them. Payne did not ask, and Riddley did not mention, whether this man had a moustache or any facial hair.

Officer Payne testified that Riddley described a second suspect as "a light skinned black male adult, five-eight, black hoodie, unknown further description …." Riddley did not say anything about this suspect's shoes.

The traffic stop

At 1:43 a.m., Officer McLane was on patrol in Modesto. He noticed an older model red Oldsmobile had different colored taillights and an obstructed rear view mirror. He conducted a traffic stop because of these observations.

When Officer McLane walked up to the driver's side, he noticed the driver was a heavyset black male with dreadlocks. There was a passenger in the car, and a black hooded sweatshirt and a roll of red duct tape in the back seat. The sweatshirt was "in the back seat towards the center, but more on the driver's side than the passenger side."

Officer McLane believed the driver matched the description he had just heard of the primary robbery suspect. He held the driver and passenger at gunpoint and immediately called for backup assistance.

Defendant was the driver and the registered owner of the car. Donte Brooks (Brooks) was the passenger. They complied with Officer McLane's orders. The black hooded sweatshirt was size 5X. Defendant was wearing purple shoes.

Identification of defendant

About 10 minutes after the traffic stop, Officer Payne drove Riddley to the scene where other officers had detained defendant and Brooks. Riddley sat in the front passenger seat of Payne's patrol car. Payne read Riddley an advisement pursuant to *Simmons v. United States* (1968) 390 U.S. 377, that she was going to look at someone who may or may not be the person who committed the crime, and to be honest about her identification. Riddley said she understood the advisement.

Officer Payne parked at the scene of the traffic stop, and Riddley stayed in his patrol car. Another officer escorted Brooks to within 25 feet of Riddley's position in the patrol car. Brooks was wearing a white T-Shirt. He was not wearing a sweatshirt. Brooks had been wearing bright blue shoes when he was stopped, but the officers removed the shoes from him before the showup. Riddley said Brooks was one of the men who came into her apartment, and he looked through her property. Riddley was then shown the bright blue shoes. Riddley told Payne that she was "a hundred percent sure that that was him, and he had specific shoes that she remembered from the crime scene."

Officer Payne testified an officer next escorted defendant to within 25 feet of the patrol car. Defendant was wearing a black shirt and dark pants. He was not wearing a sweatshirt. His black hair was in dreadlocks and pulled back into a ponytail.

Riddley asked Payne if he could drive closer so she could get "a more clear look of his face." Payne moved his patrol car to within 10 feet of defendant. Riddley said defendant "was the person who hit her in the face with the gun." Riddley said her identification was based on defendant's face.

Officer Payne testified that defendant appeared to meet the description provided by Riddley. Payne testified that at the time of the field identification, he did not notice whether the tips of defendant's hair were colored. Later in the investigation, however, Payne testified that he noticed "reddish color" in defendant's hair.

Officer Payne also testified defendant had a mustache. When Riddley gave her initial description, however, she did not mention, and Payne did not ask, if the primary suspect had a mustache.

Riddley's pretrial statements

In December 2012, Riddley was interviewed by the prosecutor and a detective. She said that she was now 50 percent certain about her identification of Brooks as one of the robbery suspects. Her uncertainty was "[b]ecause there was a pretty far distance of

time" between the robbery and the interview, and "everything was kind of a blur, and I was trying to figure it out."[3]

However, Riddley told the investigators that she was a "hundred percent sure" about her identification of defendant as the man who hit her with the gun.

Trial identification

At trial, Riddley identified defendant as the heavyset suspect who demanded the money and hit her with the gun. Riddley testified defendant was the second man she saw at the infield showup and identified on the night of the robbery. Riddley testified she did not have any doubts about her identification of defendant on the night of the robbery and at trial. Riddley testified that during the infield showup, she did not have any difficulty identifying defendant because he looked the same as he did in her apartment, except he was not wearing the hooded sweatshirt. The basis for her identification was his face.

Riddley testified defendant's dreadlocks looked the same at trial, but they were "dangling down," whereas they were in a ponytail during the robbery.

Riddley testified defendant had a mustache when he committed the robbery and when she saw him at the scene of the traffic stop. However, she never told Officer Payne about the mustache because he didn't ask.

Riddley also testified that defendant's hair color looked the same as it was during the robbery. The prosecutor asked defendant to stand up, and for Riddley to take a closer look at the bottom part of his dreadlocks. Riddley testified his hair was "[l]ight brown, gold." Riddley again testified defendant's hair color looked the same and she saw "some gold" during the robbery, but she failed to tell the officer about it.

Riddley testified the investigators did not show her any photographs of suspects at any time prior to trial.

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[3] At defendant's sentencing hearing, defense counsel stated that the People dismissed the robbery charges against Brooks after Riddley said she was only 50 percent sure about her identification of him. The jury was not advised of this fact.

Also at trial, the prosecutor showed Riddley the hooded sweatshirt seized from defendant's car. Riddley had not been shown this item before trial. She testified it was consistent with the one that defendant wore during the robbery.

Riddley testified she had smoked marijuana a couple of hours before the robbery, but her ability to perceive, see, and hear was not impaired. Riddley testified she had not used marijuana, methamphetamine, or any other drugs between the robbery and the trial.

On cross-examination, defense counsel asked Riddley about a post on her Facebook page, where she wrote: " 'I am meth,' " and " 'I'm so glad I came to NA on time before I got to that point. Thank God for showing me the way.' " Riddley testified she had started attending Narcotics Anonymous three weeks before trial, and insisted she only used marijuana and not methamphetamine. The references to "meth" on her Facebook page were because she was taken away from her mother because of her mother's methamphetamine use. She had also posted a story about a girl who died from methamphetamine use.

Riddley refused to speak to a defense investigation before trial.

Defense

Defendant did not testify. The defense relied on expert testimony from Debra Davis, Ph.D., a research psychologist, about memory and eyewitness identification. Dr. Davis did not interview Riddley or watch her testimony but reviewed police reports about the incident.

Dr. Davis testified that in cases where a person has been wrongfully convicted or proven innocent, there is at least one eyewitness who mistakenly identified that person as the suspect in about 75 percent of the cases. Dr. Davis believed there was almost no relationship between a witness's confidence in the identification of a suspect, and the accuracy of that identification. She explained that memory faded over time, and it was not easy to recall and recognize a stranger's face.

Dr. Davis discussed a study conducted in Egypt about identifying strangers. When a person looked at a subject for 30 seconds and then reviewed a lineup, the person's identification was accurate 70 percent of the time. If the subject was not in the lineup, one in five people still identified someone anyway. In another similar study, the accuracy of the identification was 68 percent.

Dr. Davis testified that in a study which involved an infield showup identification, the accuracy increased. However, if the person looked at a subject who was not the target, the person still identified someone 19 percent of the time. In another study of actual criminal cases, crime victims were shown subjects who were known to be innocent; about 30 percent of the time, the victims identified someone from that group.[4]

Dr. Davis testified there were various factors for "memory encoding," including "how much time did they have to observe? But the very, very crucial thing is what were they observing? Because if … this event took 20 minutes, they had 20 minutes to observe this perpetrator," but during that time they could have been observing other things besides the perpetrator's face. The tendency of most people was to look away at a perpetrator's face when being threatened.

Dr. Davis testified another factor was whether there was anything which interfered with the witness's ability to observe, such as poor lighting. A person's facial features were "much more distinct in good lighting," and distance and "line of sight" were also issues. "[W]hat often happens is that the witness may see somebody from the side or form the back, but not directly full face on." A perpetrator's hair covering would also impair accuracy. Another factor was whether the witness looked directly into the suspect's face. "[W]e're most likely to remember the things that we do focus on, that we focus on longer, and [that] we think about while we're focusing on it." The

[4] Davis repeatedly cited various "studies" in her testimony, and apparently used a slide presentation with the jury. However, she did not recite the names or authors of those studies except for a few examples cited herein.

identifications from children, and adults older than 50 years, were less accurate than from a witness in his or her 20's.

Dr. Davis testified that in studies where the suspect had a gun, the witness's attention turned to the weapon and the face is less well remembered. Stress also impacted memory. Dr. Davis cited a study about soldiers in survival and prisoner training, who were subject to a high degree of stress and physical interrogation. In those cases, the soldiers could identify their interrogator about 30 percent of the time. A study in London showed that there were more false identifications in high stress situations.

Dr. Davis testified that if the witness is asked to identify a person as a suspect, the witness might be influenced by statements from the police, "like they say we think this is the guy, we want you to come down here and see if you can identify him." In those cases, the witness might identify someone because "the police have indicated that they believe it's the right person and they don't want to cause trouble with being able to prosecute the crime."

Dr. Davis testified that if the perpetrator and an innocent person looked and dressed alike, there was a strong clothing bias and the innocent person was more likely to be falsely identified even if given the witness received the proper admonition. A witness who displays a "behavorial commitment effect" will not change his or her mind once the public identification is made.

On cross-examination, Dr. Davis testified there was no "cross-racial deficit" in this case[5], and Riddley did not appear submissive to the robbery suspects. If Riddley focused more on one person than the gun, that would be a factor to consider, but Dr. Davis testified it was inconsistent with human nature to instead focus on the perpetrator. However, it was better if the victim had a longer time to look at the suspect's face, the

[5] Riddley testified she was African-American and Native-American, her family was African-American, she grew up among African-Americans, and she had no difficulty recognizing African-Americans.

victim was young, and the victim provided a description of the suspect immediately after the crime.

Charges, convictions, and sentence

Defendant was charged with counts I and II, first degree robbery of Riddley and Bradford while acting in concert with two or more persons (Pen. Code, §§ 212.5, subd. (a), 213, subd. (a)(1)(A)),[6] with the special allegation that defendant personally used a firearm (§ 12022.53, subd. (b)). It was also alleged that defendant had one prior strike conviction; one prior serious felony enhancement (§ 667, subd. (a)); and one prior prison term enhancement (§ 667.5, subd. (b)).

After a jury trial, defendant was convicted of counts I and II, and the personal use enhancement was found true. The court found the prior conviction allegations true.

Defendant was sentenced to 34 years four months in state prison. The court imposed the midterm of six years for count I, robbery, doubled to 12 years as the second strike term, plus ten years for the firearm allegation. As to count II, robbery, the court imposed two years (one-third the midterm), doubled to four years as the second strike term, plus three years four months for the firearm allegation (one-third the midterm). The court also imposed a consecutive term of five years for the prior serious felony enhancement, for an aggregate term of 34 years four months.

DISCUSSION

I. CALCRIM No. 315

Defendant contends the court erroneously instructed the jury with CALCRIM No. 315, the pattern instruction regarding how the jury should evaluate a witness's testimony about eyewitness identification. Defendant asserts the instruction improperly allowed the jury to consider the "certainty" of the witness's identification as one of the factors to decide whether the eyewitness gave truthful and accurate testimony. Defendant

[6] All further statutory references are to the Penal Code unless otherwise indicated.

argues that the certainty of the witness's identification has been discredited by various studies and reports, and this court must similarly discount prior opinions to the contrary from the United States and California Supreme Courts. Defendant concludes the instructional error is prejudicial because his conviction solely rested on Riddley's identification of him.

Defendant separately argues defense counsel was prejudicially ineffective for failing to object to CALCRIM No. 315 and request deletion of the "certainty" language.

We will examine the instructions and defendant's arguments, and find that they have been rejected by the California Supreme Court.

A. The instructions

The jury in this case was instructed with CALCRIM No. 315 as follows:

> "You have heard eyewitness testimony identifying the defendant.
>
> "As with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony.
>
> "In evaluating identification testimony, consider the following questions:
>
> "Did the witness know or have contact with the defendant before the event?
>
> "How well could the witness see the perpetrator?
>
> "What were the circumstances affecting the witness' ability to observe such as lighting, weather conditions, obstructions, distance, and duration of observation.
>
> "How closely was a witness paying attention?
>
> "Was a witness under stress when he or she made the observation?
>
> "Did the witness give a description, and how does that description compare to the defendant?
>
> "How much time passed between the event and the time when the witness identified the defendant?

"Was the witness asked to pick the perpetrator out of a lineup?

"Did the witness ever fail to identify the defendant?

"Did the witness ever change his or her mind about the identification?

"*How certain was a witness when he or she made an identification*?

"Are the witness and the defendant of different races?

"Was the witness able to identify other participants in the crime?

"Were there any other circumstances affecting the witness' ability to make an accurate identification?

"The People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime.

"If the People have not met this burden, you must find the defendant not guilty." (Italics added.)

CALJIC No. 2.92 was the predecessor pattern instruction to CALCRIM No. 315. (*People v. Sanchez* (2016) 63 Cal.4th 411, 461 (*Sanchez*).) It similarly stated that "the jury should consider any factor that bears on the accuracy of the identification including, but not limited to, specified factors. One of the specified factors was '*the extent to which the witness is either certain or uncertain of the identification*.' [Citation.]" (*Ibid*., italics added, fn. omitted.)

B. Defendant's arguments and existing authorities

Defendant asserts CALCRIM No. 315 is erroneous and misleading because it includes the "certainty" factor, as italicized above. Defendant argues the "certainty" factor improperly "ratifies" the common misperception that a witness's certainty about an identification correlates with his or her accuracy, where "abundant scientific research over the last few decades" has shown that "a witness's perceived sense of certainty about his or her identification is not a good indicator of the identification's accuracy."

In making this argument, defendant acknowledges that a series of cases from the United States and California Supreme Courts, and California appellate courts, have repeatedly found that "certainty" is an appropriate factor to evaluate eyewitness identifications, and CALCRIM No. 315 and CALJIC No. 2.92 are correct statements of the law and constitutional.

For example, in *Neil v. Biggers* (1972) 409 U.S. 188 (*Neil*), the court identified several factors to consider to determine the reliability of an identification, including "the level of certainty demonstrated by the witness at the confrontation …." (*Id*. at pp. 199–200.) In *Perry v. New Hampshire* (2012) 565 U.S. ___ [132 S.Ct. 716] (*Perry*), the court addressed defendant's due process argument about the reliability of an identification. In doing so, *Perry* cited the factors set forth in *Neil*, including certainty, and held these factors are properly considered in evaluating the reliability of eyewitness identifications. (*Id*. at pp. 725–726 & fn. 5.)

In *People v. McDonald* (1984) 37 Cal.3d 351 (overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 912–914), the court examined expert testimony about the reliability of eyewitness identifications, and acknowledged that "the majority of recent studies have found no statistically significant correlation between confidence and accuracy …." (*McDonald*, *supra*, at p. 369.) *McDonald* held the defense was entitled to an instruction on expert testimony about mistaken identification, but did not address the wording of such an instruction. (*Id*. at p. 377, fn. 24.)

In *People v. Wright* (1988) 45 Cal.3d 1126 (*Wright*), the court held that "a proper instruction on eyewitness identification factors should focus the jury's attention on facts relevant to its determination of the existence of reasonable doubt regarding identification, by listing, in a neutral manner, the relevant factors supported by the evidence." (*Id.* at p. 1141.) *Wright* concluded that CALJIC No. 2.92 "usually provide[s] sufficient guidance on eyewitness identification factors," and rejected the claim that it was " 'deficient' for failing to explain the effects of the enumerated factors. [Citation.]"

(*Wright, supra*, at p. 1141.) "[T]he listing of factors to be considered by the jury will sufficiently bring to the jury's attention the appropriate factors, and that an explanation of the *effects* of those factors is best left to argument by counsel, cross-examination of the eyewitnesses, and expert testimony where appropriate. The instruction should list the applicable factors in a neutral and nonargumentative instruction, thus effectively informing the jury without improperly invading the domain of either jury or expert witness. It should list only factors applicable to the evidence at trial, and should refrain from being unduly long or argumentative." (*Id*. at p. 1143, fn. omitted.)

In *People v. Johnson* (1992) 3 Cal.4th 1183 (*Johnson*), the defendant argued the court should have deleted the certainty factor from CALJIC No. 2.92 because the defense expert testified "without contradiction that a witness's confidence in an identification does not positively correlate with its accuracy," and the instruction contracted the defense expert's testimony. *Johnson* rejected these arguments and upheld the certainty factor in the pattern instruction. *Johnson* held the court was not permitted to instruct the jury to view the evidence consistent with the defense expert's testimony, and the jury was free to reject the expert's testimony even though it was not contradicted. (*Id*. at pp. 1231–1232.)

The court again addressed the issue in *People v. Ward* (2005) 36 Cal.4th 186 (*Ward*), and rejected the defendant's claim that the trial court had a sua sponte duty to modify CALJIC No. 2.92 to reflect certain scientific principles regarding certainty. (*Id*. at pp. 213–214.) In *People v. Arias* (1996) 13 Cal.4th 92 (*Arias*), the court cited *Neil* and again included certainty as one of the factors to evaluate the reliability of an eyewitness identification. (*Arias*, *supra*, at p. 168.)

In *People v. Gaglione* (1994) 26 Cal.App.4th 1291, the defendant argued that the certainty factor in CALJIC No. 2.92 was erroneous and should have been deleted. (*Id*. at pp. 1302–1303.) *Gaglione* relied on *Wright* and held the instruction was proper because it did not take a position on the significance of the witness's certainty, but merely called attention to certainty as a factor. (*Id*. at pp. 1302–1303.) A similar result was reached in

People v. Sullivan (2007) 151 Cal.App.4th 524, which relied on *Wright* and *Gaglione*, held the trial court did not have a sua sponte duty to modify CALJIC No. 2.92, and rejected the defendant's argument that the court should have deleted the certainty factor from the instruction. (*Sullivan, supra*, at pp. 561–562.)

Defendant asserts the rationales upon which these cases relied are no longer valid and must be reconsidered because they failed to address subsequent "scientific literature and out-of-state cases over the past decade disapproving that [certainty] factor." In his appellate brief, defendant cites several studies and reports from various journals, and asserts these studies have "confirmed the weak correlation between confidence and accuracy." In doing so, however, defendant fails to note that the defense expert in this case did not testify about these particular studies or reports, and they were not before the trial court or addressed in the record.

Nevertheless, defendant concludes that in "light of this new research, United States Supreme Court and California precedent on eyewitness identification is dangerously outdated," and urges this court to adopt Justice Sotomayor's dissent in *Perry* and the position taken by the amicus briefs in that case, that a witness's certainty is not a proper factor to evaluate the reliability of the eyewitness identification.

Defendant also cites to cases from other states, and asserts they have disapproved instructions similar to CALCRIM No. 315 and the inclusion of "certainty" as a factor. (*State v. Lawson* (2012) 352 Ore. 724 [291 P.3d 673]; *State v. Long* (Utah 1986) 721 P.2d 483; *Brodes v. State* (2005) 279 Ga. 435 [614 S.E.2d 766]; *Commonwealth v. Santoli* (1997) 424 Mass. 837 [680 N.E.2d 1116]; *State v. Guzman* (Utah 2006) 133 P.3d 363; *State v. Henderson* (2011) 208 N.J. 208 [27 A.3d 872].)

Defendant concludes that "[t]he time has come for California to enter the modern world. Given the weight of scientific research rejecting certainty as evidence of accuracy, instruction with CALCRIM No. 315 violated [defendant's] Fourteenth Amendment right to due process of law."

C. Analysis

We first note that defendant did not object to CALCRIM No. 315, request modification of the instruction, or ask the court to delete the "certainty" factor. Defendant's failure to do so forfeits appellate review of this issue. The trial court does not have a sua sponte duty to modify CALCRIM No. 315. (*Ward, supra*, 36 Cal.4th at p. 213; *People v. Sullivan, supra*, 151 Cal.App.4th at p. 561.) "If defendant had wanted the court to modify the instruction, he should have requested it." (*Sanchez, supra*, 63 Cal.4th at p. 461.)

In the alternative, defendant asserts defense counsel was prejudicially ineffective for failing to request modification of CALCRIM No. 315 and the certainty factor, and the error was prejudicial since his conviction solely rested on Riddley's identification. "To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings. [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003.)

"A claim of ineffective assistance of counsel based on a trial attorney's failure to make a motion or objection must demonstrate not only the absence of a tactical reason for the omission [citation], but also that the motion or objection would have been meritorious if the defendant is to bear his burden of demonstrating that it is reasonably probable that absent the omission a determination more favorable to defendant would have resulted. [Citations.]" (*People v. Mattson* (1990) 50 Cal.3d 826, 876.)

In turning to the merits of defendant's ineffective assistance claim, a defense motion to modify CALCRIM No. 315 to delete the "certainty" element would not have been successful given the United States Supreme Court's continued approval of certainty

as a factor to evaluate eyewitness identifications. (*Neil, supra,* 409 U.S. at pp. 199–200; *Perry, supra,* 132 S.Ct., *supra,* at pp. 725–726 & fn. 5.) The trial court would have also been bound by the California Supreme Court opinions in *Wright, Johnson, Ward,* and *Arias*, which approved the inclusion of the "certainty" factor in the pattern instructions. (*Auto Equity Sales. Inc. v. Superior Court* (1962) 57 Cal.2d 450.) In addition, the opinions from other states are not binding authorities on this court or the trial courts. (*People v. Hartsch* (2010) 49 Cal.4th 472, 509; *People v. Montes* (2014) 58 Cal.4th 809, 884.)

The California Supreme Court recently rejected an attack on the "certainty" factor, similar to the one which defendant has raised in this appeal. In *Sanchez,* the court instructed the jury with CALJIC No. 2.92 on eyewitness identification evidence, and the defendant did not object. On appeal, the defendant argued the instruction was erroneous because certainty factor was no longer valid, based on various scientific studies and cases from other states. (*Sanchez, supra,* 63 Cal.4th at p. 461.)

Sanchez held the defendant forfeited appellate review of the issue because he failed to object to the instruction. *Sanchez* further noted that the defendant may not have objected to the "certainty" language because the case "involved many identifications, some certain, some uncertain. Defendant would surely want the jury to consider how *uncertain* some of the identifications were, as CALJIC No. 2.92 instructs." (*Sanchez, supra,* 63 Cal.4th at pp. 461–462, italics in original.)

Sanchez also rejected the defendant's instructional argument on the merits:

> "Studies concluding there is, at best, a weak correlation between witness certainty and accuracy are nothing new. We cited some of them three decades ago to support our holding that the trial court has discretion to admit expert testimony regarding the reliability of eyewitness identification. (*People v. McDonald* (1984) 37 Cal.3d 351, 369 ….) In *People v. Wright* (1988) 45 Cal.3d 1126, 1141…, we held 'that a proper instruction on eyewitness identification factors should focus the jury's attention on facts relevant to its determination of the existence of

reasonable doubt regarding identification, by listing, in a neutral manner, the relevant factors supported by the evidence.' We specifically approved CALJIC No. 2.92, including its certainty factor. (*Wright*, at pp. 1144, 1166 ….) We have since reiterated the propriety of including this factor. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1231-1232….)

"Defendant correctly notes that some courts have disapproved instructing on the certainty factor in light of the scientific studies. (E.g., *State v. Mitchell* (2012) 294 Kan. 469 [275 P.3d 905]; *Commonwealth v. Santoli* (1997) 424 Mass. 837 [680 N.E.2d 1116].) But, in a case like this involving uncertain as well as certain identifications, it is not clear that even those cases would prohibit telling the jury it may consider this factor. As the *Santoli* court noted, 'It is probably true that the challenged instruction has merit in so far as it deals with the testimony of a witness who expressed doubt about the accuracy of her identification ….' (*Santoli*, at p. 1121.) Any reexamination of our previous holdings in light of developments in other jurisdictions should await a case involving only certain identifications." (*Sanchez*, *supra*, 63 Cal.4th at p. 462.)

Sanchez further held that the defendant did not suffer any prejudice.

"The instruction cited the certainty factor in a neutral manner, telling the jury only that it could consider it. It did not suggest that certainty equals accuracy. In this case, telling it to consider this factor could only benefit defendant when it came to the uncertain identifications, and it was unlikely to harm him regarding the certain ones." (*Sanchez*, *supra*, 63 Cal.4th at p. 462.)

As applied to this case, Riddley identified both defendant and Brooks at the infield showup, and stated she was 100 percent certain of those identifications at the time. Riddley admitted that when she talked to the investigators six months after the robbery, she was not certain of her identification of Brooks as one of the robbers. Such an admission was relevant to undermine the certainty of her identification of defendant. While the jury was not aware that the charges against Brooks were dropped, defense counsel cited Riddley's uncertainty about Brooks in closing argument, in support of his assertion that her identification of defendant was also unreliable: "What she will say about [defendant] in six months, no one knows." As in *Sanchez*, the defense relied on the

"certainty" factor in CALCRIM No. 315 in an attempt to undermine the reliability of Riddley's identification of defendant.

More importantly, however, we are bound by the California Supreme Court's rulings in *Sanchez*, *Wright*, and *Johnson*, and the United States Supreme Court's continued approval of the "certainty" factor in *Neil* and *Perry*. We find the court correctly instructed the jury with CALCRIM No. 315, and defense counsel's failure to object was not ineffective.

II. Ineffective Assistance; Closing Argument

Defendant raises another issue of ineffective assistance based on defense counsel's closing argument, when he discussed the importance of the hooded sweatshirt found in the backseat of defendant's car.

A. Background

In closing argument, the prosecutor discussed the reliability of Riddley's identification of defendant and argued Riddley's initial description of the suspect was consistent with defendant's appearance. He also argued that the defense claimed "that all we have is one victim and an ID," but asserted the discovery of the hooded sweatshirt in defendant's car was another factor to support Riddley's identification.

Defense counsel argued Riddley's identification was not reliable and discussed the defense expert's testimony. Defense counsel argued there was no evidence to corroborate Riddley's identification, such as the primary suspect's gun or the stolen property. Instead, there was only the sweatshirt found in defendant's car.

> "And yes, is there any other evidence that corroborates the fact that [defendant] was in the apartment and committed this home invasion? *Yes, there was the sweater with the hoodie found [in] the back seat, very very compelling evidence*.
>
> "What about some other facts? What about the guns, the firearms that they were using? Right? This is 45 minutes after the incident and in close proximity to where the home invasion occurred. And then [defendant] would be just driving around, going into downtown Modesto?

> Does that make any sense? Where are the guns? Where are the rings? There were rings taken. Where are the rings? There were phones, there were cell phones taken. [¶] … Where are the fingerprints? Did anyone go in there and look for fingerprints? Four to five individuals went in, and she was pistol-whipped, and she was in the bedroom, and these people were ransacking her bedroom, then they left. Is it possible that there could be some fingerprints there? … *But no, they have all the evidence they need to corroborate, because they found a hoodie in the back seat*." (Italics added.)

In rebuttal, the prosecutor asserted Riddley's identification of defendant was reliable and consistent with her description of the primary suspect. The prosecutor argued it was a "compelling case," and the defense had to attack the case by "throwing all the things around." The prosecutor attacked the credibility of the defense expert and her testimony about various studies.

The prosecutor also cited defense counsel's discussion of the hooded sweatshirt:

> "[Defense counsel] told you that the prosecution showed you – I can't remember his exact words, but it was terrific, evidence that was strong evidence, it was a hoodie found in defendant's car. That's difficult to get away from. Where does that leave him for argument? Well, difficult, difficult one."

B. Analysis

Defendant argues that defense counsel committed prejudicial misconduct when he called the hooded sweatshirt "compelling" evidence, which led to the prosecutor's rebuttal argument which cited defense counsel's words that the hoodie was strong evidence. Defendant asserts counsel's argument effectively "seal[ed]" his guilt.

We disagree with defendant's characterization of counsel's argument. Defense counsel was faced with the daunting task of attacking the crime victim's positive identification of defendant, and evidence that he matched her description of the primary suspect who hit her with the gun. The entirety of the defense counsel's argument, taken in context, strongly implies that counsel was mocking the prosecutor's reliance on a black sweatshirt as the only corroborative evidence of a violent home invasion robbery, committed by multiple gunmen who stole specific items of property, and who were

apprehended shortly after the crime. Counsel pointed out that the police did not find any guns or stolen property in defendant's car, but they only found the hooded sweatshirt. By trying to undermine the importance of the black sweatshirt, defense counsel then tried to attacked the reliability of Riddley's identification of defendant, and undermine the only other evidence of guilt. The fact that counsel was not successful does not mean that his tactical decision constituted prejudicial ineffectiveness.

III. The Prior Prison Term Enhancement

The court found true the allegations that defendant had a prior serious felony conviction pursuant to section 667, subdivision (a), and served a prior prison term pursuant to section 667.5, subdivision (b). At the sentencing hearing, the court imposed a consecutive term of five years for the section 667, subdivision (a) prior serious felony enhancement, and stated that it would be applied "only once. The [section] 667.5(b) prior is stayed."

Defendant contends, and the People concede, the court improperly stayed the term for the section 667.5, subdivision (b) prior prison term enhancement, and that such an enhancement may only be stricken.

Under section 667.5, subdivision (b), the trial court is required to impose a consecutive one-year term for each prior prison term served for any felony. (*People v. Savedra* (1993) 15 Cal.App.4th 738, 746–747.) Once a prior prison term allegation is found true, the trial court must either impose a consecutive one-year enhancement term pursuant to section 667.5, subdivision (b), or exercise its discretion to strike the allegation pursuant to section 1385. (*People v. Langston* (2004) 33 Cal.4th 1237, 1241; *People v. Garcia* (2008) 167 Cal.App.4th 1550, 1561; *People v. Campbell* (1999) 76 Cal.App.4th 305, 311; *People v. Haykel* (2002) 96 Cal.App.4th 146, 151; *People v. Jones* (1992) 8 Cal.App.4th 756, 758.) The failure to do so results in a legally unauthorized sentence. (*People v. Bradley* (1998) 64 Cal.App.4th 386, 390–392.)

Thus, the court's decision to stay the prior prison term enhancement was an unauthorized sentence. (See *People v. Irvin* (1991) 230 Cal.App.3d 180, 192–193; *People v. Cattaneo* (1990) 217 Cal.App.3d 1577, 1588–1589.) It is unnecessary to remand the matter to the trial court to decide whether to impose or strike the enhancement, because it is clear from the court's comments that the court did not intend to impose that term. As such, we will strike the improperly stayed prior prison term enhancement.

DISPOSITION

The abstract of judgment shall be amended to reflect that the prior prison term enhancement is stricken and not stayed. In all other respects, the judgment is affirmed.

_____
POOCHIGIAN, J.

WE CONCUR:

_____
KANE, Acting P.J.

_____
FRANSON, J.